



## ROCKY MOUNTAIN WILD

1536 Wynkoop, Suite 303  
Denver, Colorado 80202  
303.546.0214  
<http://rockymountainwild.org>

Juan Palma  
Bureau of Land Management  
Utah State Office  
PO Box 45155  
Salt Lake City, Utah 84145

September 13, 2012

**Re: Protest of the Bureau of Land Management's Notice of Competitive Oil and Gas Lease  
Sale of Parcels with High Conservation Value**

Dear Director Palma:

In accordance with 43 C.F.R. §§ 4.450-2; 3120.1-3, Rocky Mountain Wild ("Protesting Party")  
protest the November 8, 2012 sale of the following parcels.

**I. Protested Parcels**

UTU89231	UTU89233	UTU89234	UTU89235	UTU89236
UTU89238	UTU89239	UTU89240	UTU89241	



## II. Protesting Party

Rocky Mountain Wild is a non-profit environmental organization based in Denver, Colorado, that works to conserve and recover the native species and ecosystems of the Greater Southern Rockies using the best available science. RMW was formed in July 2011 by the merging of two organizations, Center for Native Ecosystems ("CNE") and Colorado Wild, and is the legal successor to both parties. Colorado Wild has worked for over a decade to protect, preserve, and restore the native plants and animals of the Southern Rocky Mountains.

Both CNE and Colorado Wild have a well-established history of participation in Bureau of Land Management ("BLM") planning and management activities, including participation in Colorado BLM oil and gas leasing decisions and the planning processes for the various Colorado BLM Field Offices ("FO"). RMW continues the work of each organization to save endangered species and preserve landscapes and critical ecosystems. It achieves these goals by working with biologists and landowners, utilizing GIS technology to promote understanding of complex land-use issues, and monitoring government agencies whose actions affect endangered and threatened species. Its members include approximately 1200 outdoor enthusiasts, wildlife conservationists, scientists, and concerned citizens across the country.

RMW's staff and members visit, recreate on, and use lands on or near the parcels proposed for leasing. Our staff and members enjoy various activities on or near land proposed for leasing, including viewing and studying rare and imperiled wildlife and native ecosystems, hiking, camping, taking photographs, and experiencing solitude. Our staff and members plan to return to the subject lands in the future to engage in these activities, and to observe and monitor rare and imperiled species and native ecosystems. We are collectively committed to ensuring that federal agencies properly manage rare and imperiled species and native ecosystems. Members and professional staff of RMW are conducting research and advocacy to protect the populations and habitat of rare and imperiled species discussed herein. RMW has worked to protect the lesser prairie-chicken. We advocate for Endangered Species Act protection, strong agency regulations, public awareness, and protection of habitat. Our members and staff value the important role that areas of high conservation value should play in safeguarding rare and imperiled species and natural communities, and other unique resources on public land.

Our members' interests in rare and imperiled species and ecosystems on BLM lands will be adversely affected if the sale of these parcels proceeds as proposed. Oil and gas leasing and subsequent mineral development on the protested parcels, if approved without response to public comments made under the National Environmental Policy Act ("NEPA"), consultation required by the Endangered Species Act ("ESA"), and appropriate safeguards to minimize negative impacts, is likely to result in a greatly increased risk of significant harm to rare and imperiled species and native ecosystems. As a result, BLM's decision to lease the protested parcels is not based on the best available science and will result in significant harm to rare and imperiled species and native ecosystems. The proposed leasing of the protested parcels will harm our members' interests in the continued use of these public lands, and the rare and imperiled species

they support. Therefore protestors have legally recognizable interests that will be affected by the proposed action.

Matthew Sandler, Staff Attorney for Rocky Mountain Wild, is authorized to file this protest on behalf of the Protesting Party.

### **III. Acknowledgment**

The Protesting Parties would like to take this opportunity to thank BLM for placing more focus on environmental consequences earlier in the leasing process. We acknowledge that this shift in BLM's process has resulted in deferral of parcels prior to leasing. We hope that BLM's Colorado offices will continue to implement the mandates of Instructional Memorandum ("IM") 2010-117 to ensure that wildlife is conserved for future generations. Additional pre-leasing analysis in the Environmental Assessment ("EA") and focusing on a specific sub-region of the state in this lease sale both contribute to more informed decision-making and more efficient use of limited BLM and stakeholder resources.

### **IV. Affected Resources**

Oil and gas, and geothermal exploration and development authorized through the proposed leasing of the protested parcels is likely to have significant negative impacts on the greater sage-grouse, black-footed ferret, rare plants, and other wildlife species. Leasing of the protested parcels is also likely to have significant impacts on lands of high conservation value. Lands of high conservation value that may be significantly impacted by the proposed leasing include Areas of Critical Environmental Concern. Exhibit 1, attached, is RMW's internal screen results.

#### **A. Imperiled Species**

##### **1) Greater Sage-Grouse**

Parcels 89231, 89235, 89236 89241, and 89244 are within greater sage-grouse occupied habitat. Oil and gas development authorized by the leasing of the protested parcels will have significant impacts on greater sage-grouse

The March 2010 USFWS decision that listing the greater sage-grouse is "warranted but precluded," establishes the urgent need to develop and implement substantive conservation measures between now and 2015, when the Service will reconsider the status of the bird. This finding establishes that efforts to date, including the use of outdated timing and seasonal stipulations as proposed for core area parcels not deferred are inadequate.

BLM has taken proactive measures in recent months, launching the regional strategy that focuses on the conservation of sage-grouse and the protection of their habitat. Scoping for the Rocky Mountain Region populations for BLM's range-wide planning process was conducted earlier this year. But the DEIS is still several months out. At this point in time, a

conservative approach to grouse conservation must defer to the Technical Team recommendations.

Leasing large acreage of important sage-grouse habitat, prior to the completion of regional conservation planning efforts, will push the species closer to a full listing and must therefore be avoided. Pending final decisions on RMP amendments and the regional planning process that apply the recommendations of the Technical Team Report, BLM should proceed with caution and avoid any additional leasing in occupied habitat.

The introduction of the Technical Team Report recognizes that "Anthropogenic habitat impacts and lack of regulatory mechanisms to protect against further losses provided the basis for warranting listing under the Endangered Species Act (ESA) in 2010 (75 FR 13910)." Report at 4. The Report states that it seeks to provide "the latest science and best biological judgment to assist in making management decisions." Id. at 5. As such, the Report is vital to proposed actions such as the potential leasing. BLM's failure to consider the Report requires deferral of the protested parcels.

## **2) Black-Footed Ferret Management Area**

Parcels 89238 and 89239 are in black-footed ferret management areas. Parcel 89241 is in a black-footed ferret occurrence area. The black-footed ferret is the most endangered mammal in the United States and is listed as endangered under the Endangered Species Act. Parcels within black-footed ferret management areas should be withdrawn from leasing.

## **3) Imperiled Plants:**

Parcels 89233, 89236 and 89240 are near a Graham's beardtounge occurrence according to the Utah Division of Wildlife Resources. The Graham's beardtounge (or Graham's penstemon) is a candidate species for endangered species act listing. Leasing these parcels for oil and gas development will further impair this species. Road construction will introduce exotic plant species and allow easier access to its habitat for recreational uses. Fugitive dust due to oil and gas activity will injure the species. Water use and contamination is another threat to the plant. Development within Graham's penstemon habitat will precipitate the need to list the plant. BLM should withdraw these parcels in an effort to support the recovery of this species. Parcel 89236 does not have any stipulations addressing the Graham's penstemon.

Parcel 89236 is near a Uinta Basin hookless cactus occurrence. The Uinta Basin hookless cactus is listed as threatened under the Endangered Species Act. This parcel has no stipulations addressing the presence of the cactus.

## **B. Areas of High Conservation Value**

### **1). Area of Critical Environmental Concern:**

Parcels 89233, 89234, 89235, and 89236 are within the Nine Mile Canyon Area of Critical Environmental Concern ("ACEC"). Parcel 89241 is within the Red Creek Watershed ACEC.

**a. The Nine Mile Canyon has outstanding ACEC values.**

The Nine Mile Canyon is very scenic with steep, red-walled canyons, contrasting with pleasing rural and historical farmsteads. The area offers exceptional opportunities for interpretation of outstanding historical and cultural properties.

The area includes habitat for two federally listed plant species, which are endemic to the area: toad-flax cress and Uinta Basin hookless cactus.

For the visitor - sight-seeing enjoyment and historical research is rich with scenic and cultural appeal.<sup>1</sup>

**b. The Red Creek Watershed area has outstanding ACEC values.**

The fragile geologic and resultant soil development contributes one of the highest sediment yields directly to the Green River (111-tons annually).

Red Creek itself has excellent potential for exhibiting riparian development and enhancement.<sup>2</sup>

Leasing within ACEC will negatively impact the nature of these special areas. Even with stipulations, development will still require access to the mineral reserves. Drilling adjacent to the ACEC boundary will impact the ACEC. Further some of the stipulations aimed at protecting these areas can be waived, modified, or exempted. Leasing within ACEC boundaries is improper and these parcels should be withdrawn.

**V. Statement of Reasons**

Oil and gas leasing in this sensitive and diminished area should avoid all further deleterious consequences. The protested parcels will have negative impacts on habitat for imperiled species and sensitive environments. BLM has failed to adequately analyze the impacts of this leasing and should withdraw the protested parcels.

**a. The Decision Fails to Adequately Analyze the Direct, Indirect, and Cumulative Affects of Leasing These Parcels:**

NEPA dictates that BLM take a "hard look" at the environmental consequences of a proposed action and the requisite environmental analysis "must be appropriate to the action in question." *Metcalf v. Daley*, 214 F.3d 1135, 1151 (9th Cir. 2000); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). In order to take the "hard look" required by NEPA, BLM is required to assess impacts that include: "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, *whether direct, indirect, or cumulative*." 40 C.F.R. § 1508.8 (emphasis added). "[C]umulative impact analysis must be timely. It is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given

<sup>1</sup> [http://www.blm.gov/ut/st/en/fo/vernal/more/\\_blm\\_special\\_areas.html](http://www.blm.gov/ut/st/en/fo/vernal/more/_blm_special_areas.html)

<sup>2</sup> *Id.*

now.” *Kern v. US. Bureau of Land Management*, 284 F.3d 1062, 1075 (9th Cir. 2000); *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312-1313 (9th Cir. 1990). The BLM failed to adequately analyze potential direct, indirect, and cumulative impacts of the proposed leasing on the greater sage-grouse, black-footed ferret, imperiled plants and other species throughout the planning area.

“In determining the scope of the required NEPA analysis, an agency must consider not only the proposed action, but also three types of related actions – ‘connected actions’, similar ‘actions’, and ‘cumulative actions’. 40 C.F.R. 1508.25(a). ‘Cumulative actions’ are those” which when viewed with other proposed actions have cumulatively significant impacts.” *Id.* at 1508.25 (a)(2). Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts. 40 C.F.R. 1508.27 (b)(7).

- b. The BLM has failed to adequately analyze the effectiveness of the lease stipulations and other mitigation measures in the Environmental Assessment, and the determination that lease stipulations and other mitigation measures will prevent significant impacts to lesser prairie-chicken is arbitrary and capricious:**

A complete discussion of steps that can be taken to mitigate adverse environmental impacts is an important ingredient of the NEPA process. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989). “Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects.” *Id.* In recognition of the importance of a discussion of mitigation measures, Council on Environmental Quality (CEQ) regulations “require that the agency discuss possible mitigation measures in defining the scope of the EIS, 40 CFR § 1508.25(b), in discussing alternatives to the proposed action, § 1502.14(f), and consequences of that action, § 1502.16(h), and in explaining its ultimate decision, § 1505.2(c).” *Id.* at 352. When a proposed action will result in impacts to resources, the Agency is obligated to describe what mitigating efforts it could pursue to off-set the damages that would result from the proposed action. *See 40 C.F.C. § 1502.16(h) (2009)* (stating that an EIS “shall include discussions of . . . [m]eans to mitigate adverse environmental impacts”).

“Mitigation must ‘be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.’” *Carmel-by-the-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1996). (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353 (1989)). The Ninth Circuit explained that fair evaluation requires agencies to “analyze[] the mitigation measures in detail [and] explain how effective the measures would be. A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Nw. Indian Cemetery Protective Ass’n v. Peterson*, 764 F.2d 581, 588 (9th Cir. 1985), *rev’d* on other grounds, 485 U.S. 439 (1988).

In *Davis v. Mineta*, the Tenth Circuit found that federal agencies did not comply with NEPA when they relied on the possibility of mitigation measures in issuing a FONSI. According to the court, “[m]itigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the

now." *Kern v. US. Bureau of land Management*, 284 F.3d 1062, 1075 (9th Cir. 2000); *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312-1313 (9th Cir. 1990). The BLM failed to adequately analyze potential direct, indirect, and cumulative impacts of the proposed leasing on the greater sage-grouse, black-footed ferret, imperiled plants and other species throughout the planning area.

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original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement.” *Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002)

The BLM must evaluate the effectiveness of the mitigation measures used in leasing with the best available science. “The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b) (2009). “For this reason, agencies are under an affirmative mandate to ‘insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements[,] identify any methodologies used and . . . make explicit reference by footnote to the scientific and other sources relied upon for conclusions[.]’” *Env’tl. Def. v. U.S. Army Corps of Eng’rs*, 515 F. Supp. 2d 69, 78 (D.D.C. 2007) (citing 40 C.F.R. § 1502.24 (2009)). If there is scientific uncertainty NEPA imposes the mandatory duties to: (1) disclose the scientific uncertainty; (2) complete independent research and gather information if no adequate information exists unless costs are exorbitant or the means of obtaining the information are not known; and (3) evaluate the potential, reasonably foreseeable impacts in the absence of relevant information. *See* 40 C.F.R. § 1502.22 (2009).

## VI. Federal Land Policy Management Act

### a. The BLM failed to Prevent Undue and Unnecessary Degradation to Lesser Prairie-Chicken Populations and Potential Conservation Areas and Has Failed to Meet its Obligations Under BLM Manual 6840:

The BLM has a duty under the Federal Land Policy and Management Act (“FLPMA”) to prevent unnecessary and undue degradation to the lands under its management. “In managing the public lands the [Secretary of Interior] shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.” 43 U.S.C. § 1732(b). The use of the imperative language “shall” makes clear that Congress intended to leave the Secretary no discretion in administering the Act. *NRDC v. Jamison*, 815 F. Supp. 454, 468 (D.D.C. 1992). “The court in *Mineral Policy Ctr. v. Norton* [found] that in enacting FLPMA, Congress’s intent was clear: Interior is to prevent, not only unnecessary degradation, but also degradation that, while necessary . . . is undue or excessive.” *Mineral Policy Ctr. v. Norton*, 292 F. Supp. 2d 30, 43 (D.D.C. 2003). In addition, that court held that “FLPMA, by its plain terms, vests the Secretary of the Interior with the authority – and indeed the obligation – to disapprove of an otherwise permissible . . . operation because the operation though necessary . . . would unduly harm or degrade the public land.” *Id.* at 49.

The purpose of Section 6840 of the BLM Manual is to provide policy and guidance for the conservation of BLM special status species and the ecosystems upon which they depend on BLM-administered lands. BLM special status species are:

- (1) species listed or proposed for listing under the Endangered Species Act (ESA), and
- (2) species requiring special management consideration to promote their conservation and reduce the likelihood and need for future listing under the ESA

The objectives of the special status species policy are:



- A. To conserve and/or recover ESA-listed species and the ecosystems on which they depend so that ESA protections are no longer needed for these species.
- B. To initiate proactive conservation measures that reduce or eliminate threats to Bureau sensitive species to minimize the likelihood of and need for listing of these species under the ESA.

#### **b. BLM Must Mitigate Adverse Effects**

The BLM must mitigate the adverse effects on the aforementioned imperiled species in order to comply with the "unnecessary and undue degradation" standard of FLPMA. BLM must also mitigate adverse effects on sensitive resources within ACEC. *Kendall's Concerned Area Residents*, 129 IBLA 130, 138; *see* 42 C.F.R. 3809.2-1(b). The BLM has failed to minimize adverse impacts of oil and gas development on the aforementioned species and lands of high conservation value.

#### **c. Consistency**

The BLM is violating FLPMA because it is not being consistent with the policies of state, tribal, and other agencies in its conservation policies regarding greater sage-grouse, black-footed ferret, imperiled plants, and other species. FLPMA requires the BLM to seek to "be consistent with officially approved and adopted resource related policies and programs . . . of other federal agencies, State and local governments and Indian tribes." 43 C.F.R. § 1610.3-2; *see* 43 U.S.C. § 1712(c)(9).

### **VII. Endangered Species Act**

The U.S. Fish and Wildlife Service has announced that the lesser prairie-chicken warrants protection under the Endangered Species Act. Leasing parcels in occupied greater sage-grouse habitat is a violation of BLM's duty to manage its land for multiple uses. One reason for the listing determination was a lack of regulatory mechanisms to protect the species. BLMs actions in leasing occupied habitat for energy development further demonstrates the agencies lack of protective mechanisms. This leasing is going to contribute to the need to list the species. Consultation with FWS should have been conducted to ensure adequate protection for this candidate species.

#### **a. Duty to Conserve and Duty to Engage in Recovery Planning**

In addition to consultation requirements, federal agencies are bound by two affirmative obligations under the ESA. Section 7(a)(1) states that federal agencies shall "seek to conserve [listed] species and shall utilize their authorities in furtherance of the purposes of [the] Act." 16 U.S.C. § 1536(a)(1). A number of courts have held that the duty to conserve imposes an independent duty upon agencies to give the conservation of a listed species top priority. *Carson-Truckee Water Conserv. Dist. v. Watt*, 549 F. Supp. 704 (D. Nev. 1982) *citing* *TVA v. Hill*, 437 U.S. 153, 184 (1978); *Bensman v. U.S. Forest Serv.*, 984 F. Supp. 1242, 1246 (D. Mont. 1997). The ESA also states that the Secretary "shall develop and implement plans for the conservation

and survival [of listed species] unless he finds that such a plan will not promote the conservation of the species." 16 U.S.C § 1533(f)(1).

### VIII. BLM has Discretion to Not Lease

Under the statutory and regulatory provisions authorizing this lease sale, the BLM has full discretion over whether or not to offer these lease parcels for sale. The Mineral Leasing Act of 1920 ("MLA") provides that "[a]ll lands subject to disposition under this chapter which are known or believed to contain oil and gas deposits *may* be leased by the Secretary." 30 U.S.C. § 226(a) (2009) (emphasis added). The Supreme Court has concluded that this "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *see also Wyo. Ex rel. Sullivan v. Lujan*, 969 F.2d 877 (10th Cir. 1992); *McDonald v. Clark*, 771 F.2d 460, 463 (10th Cir. 1985) ("While the [Mineral Leasing Act] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory y."); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975).

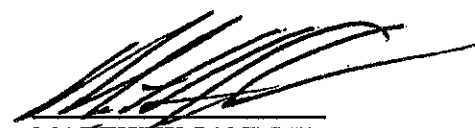
Submitting a leasing application vests no rights to the applicant or potential bidders. The BLM retains the authority not to lease. "The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the secretary whether or not to issue leases for the lands involved." *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. den.* 383 U.S. 912 (1966); *see also Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988); *Pease v. Udall*, 332 F.2d 62, 63 (9th Cir. 1964); *Geosearch v. Andrus*, 508 F. Supp. 839, 842 (D.C. Wyo. 1981).

The arguments set forth in detail above demonstrate that exercise of the discretion not to lease the protested parcels is appropriate and necessary. Withdrawing the protested parcels from the lease sale until BLM has met its legal obligations to conduct an adequate NEPA analysis by responding to public comments, upheld the requirements of the Endangered Species Act, and met the requirements of IM 2010-117 and other BLM regulations is a proper exercise of BLM's discretion under the MLA. The BLM has no legal obligation to lease the disputed parcels and is required to withdraw them until the agencies have complied with the applicable law.

### IX. Conclusion & Request for Relief

The Protesting Parties therefore requests that the BLM withdraw the protested parcels from the November 2012 lease sale.

Sincerely,



MATTHEW SANDLER

Staff Attorney

Rocky Mountain Wild

1536 Wynkoop St. Suite 303

Denver, CO 80202

Tel: (303) 546-0214 ext. 1

Email: [matt@rockymountainwild.org](mailto:matt@rockymountainwild.org)

Exhibit 1

Value Name	Area Name	Overlap Acres	Percent Overlap	Source
Greater Sage-Grouse Occupied Habitat UTDWR 2011		9	0%	UTDWR
Areas of Critical Environmental Concern UT BLM 2010	Nine Mile	520	100%	BLM
Citizen Proposed Wilderness Red Rock UT UTSGID 2009	Desbrough Canyon	33	6%	UTSGID
Utah Wilderness Inventory BLM 1999, Revised 2007	Desolation Canyon	34	7%	BLM
Areas of Critical Environmental Concern UT BLM 2010	Nine Mile	401	84%	BLM
Areas of Critical Environmental Concern UT BLM 2010	Nine Mile	1,273	100%	BLM
Greater Sage-Grouse Occupied Habitat UTDWR 2011		168	13%	UTDWR
Greater Sage-Grouse Winter Use Areas UTDWR 2011		168	13%	UTDWR
Areas of Critical Environmental Concern UT BLM 2010	Nine Mile	1,067	68%	BLM
Greater Sage-Grouse Occupied Habitat UTDWR 2011		63	4%	UTDWR
Greater Sage-Grouse Winter Use Areas UTDWR 2011		63	4%	UTDWR
Black-Footed Ferret Management Area FWS? 2007		730	100%	FWS?
Black-Footed Ferret Management Area FWS? 2007		40	99%	FWS?
Graham's Beartongue Occurrence UTDWR 2002	SURVEY SITE: WEAVER CANYON	1	0%	UTDWR
Areas of Critical Environmental Concern UT BLM 2010	Red Creek	41	101%	BLM
Citizen Proposed Wilderness Red Rock UT UTSGID 2009	Goslin Mountain	40	98%	UTSGID